

To: Szelag, Matthew[Szelag.Matthew@epa.gov]
From: Fleisig, Erica
Sent: Thur 3/2/2017 2:10:27 AM
Subject: FW: New CWA Unreasonable Delay Lawsuit to Respond to Administrative Petition Regarding Washington WQS

We'd want to add in the crosswalk for this piece as well (maybe a few would drop out):

1. EPA's promulgation of human health criteria did not fully moot out NWEA's request for aquatic life criteria, because in some cases, the EPA-recommended aquatic life criterion for a particular pollutant is more stringent than the EPA-recommended human health criterion.

From: Schroer, Lee

Sent: Wednesday, March 01, 2017 5:41 PM

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Subject: New CWA Unreasonable Delay Lawsuit to Respond to Administrative Petition Regarding Washington WQS

On February 21, 2017, the Northwest Environmental Advocates ("NWEA") filed an unreasonable delay suit against the Agency in the Western District of Washington. *Northwest Environmental Advocates v. EPA*, No. 2:17-cv-00263 (W.D.Wash.) The unreasonable delay alleged is with respect to a petition that NWEA filed on October 28, 2013, and subsequently

supplemented on August 31, 2015, and February 9, 2016.

NWEA's petition urged EPA to:

1. Make an Administrator's determination under CWA § 303(c)(4)(B) that Washington's water quality toxics criteria *for human health* needed to be updated.
2. Determine that Washington had failed to adopt certain water quality toxics criteria for *the protection of aquatic life*, required pursuant to CWA § 303(c)(2)(B).
3. Promulgate updated water quality toxics criteria for Washington, for both human health and the protection of aquatic life, by rule.

On March 4, 2016, EPA wrote to NWEA, pointing out that it was in the midst of a rulemaking process to potentially promulgate Washington water quality toxics criteria for human health if Washington itself did not act first. With respect to aquatic life, EPA noted that it expected Washington to turn to aquatic life criteria after the matter of human health criteria had been addressed. In that letter, EPA requested NWEA to provide further factual information, intended to help the Agency evaluate whether there was a legal obligation or other substantive need for EPA to promulgate aquatic life criteria for Washington State.

In November, 2016, the Administrator signed a notice of final rulemaking promulgating 144 human health criteria for Washington waters and EPA took action to approve in part and disapprove in part Washington's August 1, 2016 submission of revised human health criteria (45 approved, 143 disapproved). EPA's final rule did not include criteria for three pollutants (thallium, dioxin, and arsenic) due to scientific uncertainties regarding the underlying input variables for those pollutants. (Note that in its review of Washington's criteria submittal, EPA disapproved the State's arsenic criteria, but took no action on the State's criteria for thallium and dioxin).

On February 21, 2016, NWEA:

1. Responded to EPA's March 4, 2016 request, complaining that EPA's questions were "largely rhetorical" and that answering EPA's questions represented "work that Congress intended to be done by EPA, the states and the [wildlife] Services," rather than by NWEA.
2. Filed this unreasonable delay claim against EPA.

NWEA cites three substantive problems with the status quo, in which EPA has not yet delivered its final response to NWEA's 2013 petition:

1. EPA did not promulgate human health criteria for the full suite of pollutants that NWEA requested. NWEA notes the absence of criteria for arsenic, dioxin, and thallium.
2. Washington has not yet adopted revised aquatic life criteria.
3. EPA's promulgation of human health criteria did not fully moot out NWEA's request for aquatic life criteria, because in some cases, the EPA-recommended aquatic life criterion for a particular pollutant is more stringent than the EPA-recommended human health criterion.

The complaint asks the court to order EPA to respond to the NWEA's petition within 30 days of the date of the court's order and award plaintiff attorney fees under EAJA.

David Berol of OGC and Alex Fidis of Region 10's ORC are assigned to this matter. If you have any questions, they can be reached at (202) 564-6873 and (206) 553-4710, respectively.

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